PP

v.

KUMARAN KUNCHI RAMAN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-8-2002]
21 NOVEMBER 2008

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Father killing daughter by dousing her with petrol and burning her - Whether prima facie case proven under pre-amendment definition of prima facie case - Natural consequences of accused's act could be death - Intention to kill inferred - Evidence sufficient to convict should accused elect to remain silent - Prima facie case established*

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Mens rea - Defence of intoxication - Application of s. 85(ii) Penal Code - Whether conduct of accused consistent with guilt - Whether accused appreciated his actions - Whether intoxication proven - Absence of scientific evidence to prove intoxication not fatal - Accused acquitted and discharged but to be detained at the pleasure of Sultan*

CRIMINAL PROCEDURE: *Defence - Intoxication - Plea of intoxication as defence to charge of murder - Intoxication only to be considered at close of entire case - Self-induced intoxication - Whether accused could have formed necessary intention or knowledge for murder - Absence of scientific evidence to prove intoxication not fatal - Accused acquitted and discharged but to be detained at the pleasure of Sultan - Penal Code, ss. 85, 86, 302*

The accused was charged under s. 302 of the Penal Code for the murder of his daughter. That act was allegedly committed in the presence of his wife (SP6) and his son (SP7). The alleged act took place on a Sunday when the accused was at home drinking alcohol. An argument took place between the accused, SP6 and the deceased. To avoid the accused, SP6 and the deceased went outside the house and sat inside their family car parked in the garage in front of the house. The accused then told SP7 that he wanted to fill his motorcycle with petrol and asked SP7 to fetch some petrol. SP7 filled a small container with petrol and the accused took that container of petrol and walked out of the house

with a lighter in his hand. The accused opened the rear left door of the said car and tossed petrol into the said car where SP6 and the deceased were seated inside and struck the lighter. The accused was burnt on his chest but brushed it with his hand and went inside the house. The lower body of the deceased caught fire and SP6 dragged the deceased out of the car. The car and the garage also caught fire. The deceased was admitted at the hospital but later passed away. SP7 initially lodged a police report stating that the accused was trying to burn ants below the car but later, after the deceased passed away, lodged a second report stating that the accused burnt the deceased. The defence claimed that the accused was drunk and that he intended to burn red ants that infested the garage.

Held (acquitting and discharging accused; ordering accused to be held in custody at pleasure of Sultan):

(1) The alleged offence was committed in 2003. The definition of a *prima facie* case in s. 180(4) of the Criminal Procedure Code which came into effect on 7 September 2007 cannot apply retrospectively. Thus, the applicable definition was that as pronounced in *Balachandran v. PP*. The test at the close of the prosecution case was whether the evidence was sufficient to convict the accused if he had elected to remain silent. (para 13)

(2) Although SP7 had lodged 2 conflicting police reports, there was no difference in both reports in relation to the identity of the person who tossed the petrol and ignited the resultant fire. In both reports, SP7 consistently named the accused as the perpetrator. (para 21)

(3) The deceased had succumbed to the injuries and resultant complications, all caused by the act of the accused. Given that the natural consequences of the act of the accused could be death, it could be inferred that the intention was to kill. It could also be inferred from the act itself that the accused must know that the injury inflicted would be likely to cause death, or that it would be sufficient in the ordinary course of nature to cause death, or that the act must in all probability cause death. The ingredients of the alleged offence had been established. The evidence was sufficient to convict should the accused elect to remain silent. (para 21)

(4) Intoxication could not be considered at the stage of the prosecution case for it can be only considered at the close of the entire case. (para 33)

(5) There was no evidence that the alleged state of intoxication of the accused was caused without his consent by the malicious or negligent act of another person. The state of intoxication of the accused was self-induced. (para 33)

(6) The total conduct of the accused, as related by the prosecution, was not consistent with guilt and or with an appreciation or sufficient appreciation of his erstwhile act on the part of the accused. Although there was no scientific evidence that the accused was drunk, such scientific results are not conclusive to determine the degree of intoxication of a person. (paras 35 & 36)

(7) If the accused were not temporarily insane, then it could not be explained how the accused could kill his daughter, all because of a minor domestic row. The act of the accused was mindless and insane. In his deluded mind, the intention of the accused could well have been to burn ants that infested the said garage. Given the evidence, there was a doubt as to whether the accused in his intoxicated state could have formed the necessary intention or knowledge to constitute the offence of murder. (paras 37 & 38)

(8) The accused was acquitted and discharged on account of s. 85(ii) of the Penal Code, but with the finding that the accused committed the act and direction that the accused be held in safe custody in a suitable place of detention, during the pleasure of His Royal Highness, the Sultan of Johor. (para 39)

Case(s) referred to:
Aladin v. PP [1964] 1 LNS 4 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chia Chan Bah Alias Chiah Ah San v. Rex [1938] 1 LNS 12 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Hashim Mat Isa v. PP [1950] MLJ 94 ***(refd)***
Idu Beg [1881] 3 All 776 ***(refd)***
Ismail UK Abdul Rahman [1974] 1 LNS 53 ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***

A *Francis Anthonysamy v. PP [2003] 1 CLJ 831 CA* ***(refd)***
Juma'at Samad v. PP [1993] 3 SLR 338 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Kenneth Fook Mun Lee v. PP & Another Case [2006] 4 CLJ 359 FC ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
B *Kishore Singh AIR [1977] SC 2267* ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 ***(refd)***
Lee Fah Sang v. PP [1967] 1 LNS 80 ***(refd)***
Lee Wong Tiang v. PP [1970] 1 LNS 58 ***(refd)***
Lim Heng Soon & Anor v. PP [1969] 1 LNS 93 ***(refd)***
Mohamed Kunjo v. PP [1977] 1 LNS 74 ***(refd)***
C *PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC* ***(refd)***
PP v. Kenneth Fook Mun Lee & Another Appeal [2006] 1 CLJ 499 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Suhaimi Abdul Aziz [2005] 2 CLJ 826 FC ***(refd)***
D *PP v. Teo Heng Chye [1990] 1 CLJ 194; [1990] 3 CLJ (Rep) 904 HC* ***(refd)***
Rajwant Singh AIR [1966] SC 148 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 ***(refd)***
E *Virsa Singh AIR [1958] SC 465* ***(refd)***
Yeo Ah Seng v. PP [1967] 1 LNS 216 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1), (4), 181
Evidence Act 1950, s. 105,
F Penal Code, ss. 85(ii)(b), 86(2), 299, 300(a), (b), (c), (d), 304(b)

Penal Code [Ind], s. 304, Part II

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 25th edn, pp 1292-1294, 1296,
G 1302, 1304, 1310-1313

For the accused - Abraham Mathew; M/s Sucha Singh & Co
For the prosecution - Haslinda Abu Bakar; DPP

Reported by Amutha Suppayah
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JUDGMENT

Jeffrey Tan J:

[1] The accused was tried for the following offence.

> Bahawa kamu pada 19.08.2001 jam lebih kurang 3.00 hingga 4.00 petang di hadapan sebuah rumah No. 127A, Jalan Kemuning, Ladang Ulu Remis, Layang-Layang, di dalam daerah Kluang, di dalam Negeri Johor Darul Takzim, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian Malini a/p Kumaran k/p No. 831003-01-6778 dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] Ten witnesses (namely, two police store-keepers, a police photographer, police corporal who received the report of the wife of the accused, neighbour of the accused, wife and son of the accused, government chemist, government pathologist, and police officer in charge of the investigation) testified for the prosecution. In short, it was the prosecution story that the accused killed his daughter (deceased) by setting her alight with petrol. That act was allegedly committed in the presence of the wife (SP6 – Letchimy Devi a/p MS Demodaran) and son (SP7 – Shatesh a/l Kumaran, who was 19 when he testified) of the accused. When juxtaposed, the testimony of SP6 and SP7 could be summarized as follows.

[3] The accused, a tractor driver of Ladang Ulu Remis, was the husband of SP6 and the father of the deceased (his eldest child), SP7, and Kishen a/l Kumaran. All lived in a house – 127A, Jalan Kemuning, Ladang Ulu Remis, Layang-Layang – provided by the employer estate. 18 August 2001 and 19 August 2001 were days for Hindu prayers – Perayaan Kavadi Thiruvila – and whence it was the Hindu practice to splash kunyit water on Hindus. On 19 August 2001, which was a Sunday, the entire family was in the house. At about 12.30pm, the deceased, SP6 and SP7 had completed the household chores. The deceased, SP6 and SP7 adjourned to the hall, where they, together with Kishen, watched a Tamil movie being televised. At about 1pm, the accused awoke from his sleep and entered the hall. "OKT datang bising-bising kepada SP6."

[4] It was the testimony of SP6 that "OKT marah tanpa sebab, sebab dia mabuk" (see p. 25 of the notes of proceedings). To avoid the accused, SP6 got out of the house and sat on the front pavement. The accused followed SP6 out of the house. There, the accused and SP6 quarrelled. About 10 minutes later, the accused re-entered the house and sat on a chair in the hall. The accused said that the deceased "tidak berguna makan percuma dalam rumah, selalu meminta bantuan ayah". That incensed the deceased who promptly walked to the rear exterior of the house. About 5 minutes later, the accused also walked to the rear exterior of the house, where he "cakap bahasa-bahasa kasar dalam Bahasa Melayu" to the deceased. The deceased responded in kind. The accused picked up a piece of broken brick or stone and "menghayun tangan untuk membaling batu".

"Semasa OKT menghayun tangan dengan batu bata, Malini mengambil sebiji kelapa dihadapan Malini, atas tanah. Malini kata "awak buang bata saya pun buang kelapa" "OKT pun membuang batu bata ke tanah. Malini pun membuang kelapa ke tanah juga. Lepas itu OKT masuk ke dalam rumah, manakala Malini datang ke tempat (SP6)."

[5] Inside the house, the accused asked SP7 to inform the estate clerk that he (accused) would be taking leave on 20 August 2001. When he returned about 20 minutes later, SP7 saw SP6 and deceased seated inside the family car parked in the garage in front of house 127A (see photographs P8(1) and P6(1-4)). Inside the house, the accused said to SP7 that he wanted to fill his motorcycle with petrol. The accused asked SP7 to fetch some petrol. SP7 filled a small container (ID4D(1)) with petrol decanted from a green container (ID5). SP7 placed that small container of petrol on the table. The accused took that container of petrol and walked out of the house. The accused had a lighter in his hand. Suspecting that there could be something untoward, SP7 followed the accused, but at a distance of about 10 feet. The accused opened the rear left door of the said car, and tossed petrol into the said car then with SP6 and deceased seated inside. The accused struck the lighter. "Lepas itu api meletup." The accused was burnt on his chest. "Lepas sapu (api) dengan tangan (OKT) terus masuk dalam rumah." According to SP7, he was just 15 feet away and there were no other persons near the said car.

[6] Before that, at some time between 2-3pm, SP6 and the deceased had moved from the front pavement to the family car parked in the said garage, as the deceased was afraid that the accused would become further enraged if passers-by were to splash them with kunyit water. The car was parked with its left side facing house 127A. The deceased was seated on the left while SP6 was seated on the right of the rear passenger seat. "Lepas masuk, pintu-pintu tidak ditutup dengan rapat, cuma sedikit renggang." The front car door windows were wound up, but the rear car door windows were half wound down. Inside the car, the deceased complained that the accused would constantly pick on her and said that it would be better if she were to live in her factory hostel in Senai, Johor Bahru. SP6 tried to talk the deceased out of that idea. The deceased was facing SP6 at that time. SP6 noticed a person passing by, on the right side of the car. Then SP6 detected a strong smell of petrol. SP6 turned her head towards the deceased. The lower body of the deceased was on fire. SP6 dragged the deceased out of the car, through the right rear door. SP6 called out to SP7 to fetch water. Thereafter, the car and then the garage were on fire. SP7 proceeded to fetch water, after the accused had entered the house. "Pada ketika itu, (SP6 and deceased) berada dihadapan rumah." SP6 and others who had come to help then put out the flames on the deceased. There were burns all over the lower body and hands of the deceased. A neighbour (SP5) drove the deceased and SP6 to a private clinic at Layang-Layang. There, the doctor advised that the deceased be admitted to the general hospital. SP5 drove the deceased and SP6 to the Kluang General Hospital, where the deceased was admitted into the intensive care unit. Later, the deceased was transferred to the Johor Bahru Hospital. After the deceased had been transferred to the Johor Bahru Hospital, SP6 lodged her police report (ID10). The deceased passed away on 24 August 2001.

[7] But that was not all that was said by SP6 and SP7. SP6 testified that she did not notice the persons near the car when she first saw the deceased on fire, and that she did not know what had caused the fire. However, SP6 admitted that in her police report she reported that the accused approached the car, tossed petrol, and then set the car alight. SP6 explained that she reported so, as she saw the accused entering the house just as she was dragging the deceased out of the car and that there was

A no else around. SP6 further informed "sebelum marah saya dan Malini pada satu petang pada 19 August 2001 OKT tidak keluar rumah. OKT sedang tidur sahaja. Malini tidak menghadap apa-apa penyakit." SP6 also revealed that the accused consumed the content of the bottle (P4C) between 11am and about 12.30pm on B 19 August 2001. SP7 affirmed that the bottle (ID4(C)1) was indeed in the house on 19 August 2001, and that the accused consumed the content of a bigger bottle at 7.30pm on 18 August 2001. On the drinking habits of the accused, SP7 further said, "saya biasa nampak ayah minum dari botol besar", that he had C occasion to witness the accused drinking for 3 continuous days, and that in a month the accused would consume the content of 10 to 15 similar bottles. SP7 also said that after the flames on the deceased had been put out, neighbours "bawa (OKT) keluar dari rumah, and that a neighbour took him to the house a relative D (Mahendran).

[8] The cross-examination of SP6 and SP7 elicited the following testimony. SP6 said that on 18 August 2001 the accused consumed the content of a bigger bottle – "Memang ada botol E yang lebih besar dari botol ID4 (C) (1) ini, tetapi isi kandungan botol besar itu OKT telah minum pada 18 August 2001" – that on 19 August 2001, the accused consumed the content of only P4C, that the accused "selalu marah, lepas minum", that after drinks the accused would fall asleep, and that the accused, when F sober, was nice but would not remember his erstwhile manner whilst under the influence of alcohol. SP6 denied that she and the deceased were not sitting normally on the back passenger seat but were hiding inside the car. SP6 said she could not answer if the accused knew that she and the deceased were seated inside the G car. SP6 said she did not see the accused setting alight the fire. SP6 said (when re-examined) that she and the deceased could be seen from outside the car. SP6 said "Saya bukan pakar yang boleh berikan keterangan mabuk OKT pada ketika semasa kejadian". SP7 disclosed that after drinks the accused would be H angry if the deceased watched television, that "Kalau tidak mabuk ayah baik, tidak marah", that the accused "Lepas mabuk ayah sendiri kata tidak ingat hal marah-marah", that "Ayah saya telah minum sudah lama", that after drinks, the accused would be aggressive – "Tiap kali minum perangai ayah memang ganas. Kalau I habis 1 botol kecil memang ganas. Sebelum habis botol kecil, marahlah. Marah mulut, bising", and that "Masa ganas ayah

pernah pukul saya. Kadang-kadang halau kita keluar dari rumah, dan kunci rumah. Ayah juga cari gaduh dengan jiran. Kadang-kadang membuang makanan yang sedang dimasak. Juga ada suruh saya buka angin tayar motosikal jadikan ibu jalan kaki. Lepas mabuk, ayah tak boleh ingat apa jadi. SP7 agreed that SP6 was not inside the car when the accused and deceased quarrelled at the back of the house. SP7 denied that he had not witnessed the incident SP7 said that he could not prevent the incident as he was afraid of the accused, that in his 1st police report he reported that "ayah membakar semut dibawah kereta", but that 1st report (lodged before the death of the deceased) was not a true account of the incident, and that in his 2nd police report (lodged after the death of the deceased) he reported "ayah saya membakar kakak di dalam kereta." SP7 refuted that he was persuaded by others to lodge his 2nd police report. SP7 denied that he had not witnessed the accused tossing petrol into the car. SP7 denied that there were flames on the ground when neighbours pushed the car out of the garage that was on fire.

[9] Under re-examination, SP7 said that no one had coached or persuaded him to lodge a false report, and that the story in his 2nd report was a true account of the incident he witnessed. SP7 explained that his 1st report was lodged when the deceased was still alive and he haboured hopes then that the deceased would survive, and that this 2nd report was lodged after the deceased had passed away and he wanted then to relate the true incident.

[10] Apart from the formal, the prosecution also adduced the following evidence:

(i) from the police corporal (SP4) who received the police report of SP6, that SP6 on 19 August 2001 reported (see ID10) to the Kluang police that "suami telah bakar anak" and that her husband was drunk;

(ii) from the long time neighbour (SP5) of the accused, that at about 3pm on 19 August 2001, he (SP5) heard SP6 loudly crying "tolong", that he saw the said car on fire with the deceased still inside the said car, that he helped to drag the deceased out of the said car and put out the flames on the stomach of the deceased, that he drove the deceased and SP6 to the hospital, that he saw, when he was dragging the deceased out of the car, the accused standing in front of his

house and watching the proceedings – "OKT berdiri, tengok sahaja". Under cross-examination, SP5 testified that he had not witnessed the accused drinking but he had heard "OKT bersuara macam mabuk, sebulan sekali". SP5 added that he could not say if the accused were then drunk, and or if the accused was also injured in the incident;

(iii) from the pathologist (SP8 – Dr. Shahidan bin Mohd Noor) who conducted the post mortem of the deceased on 24 August 2001, that the skin of the deceased in the area of the whole of the left lower limb, from the wrist to the toes, both front and back, in the lower half front of the right thigh, corner right leg, back of right lower limb, all area below both elbows, on the abdomen below the navel and around the abdomen to the back, had been burnt away, that more than 50% of the surface area and or outer skin was totally burnt, that the internal condition of the deceased was consistent with those 50% burns, that micro-organisms had entered the body system of the deceased, that the chances of survival are slim in cases of 30% burns, and that the cause of death of the deceased was the burns and the resulting complications;

(iv) from a government chemist (SP9 – Muhammad Yazid bin Ibrahim), that the interior of the said car was totally burnt, that "Bahagian luar, pengelupasan cat, dibahagian bumbung, bonnet belakang dan hadapan serta kiri kenderaan", that "Tayar belakang kiri terbakar dan pancit", that there was the strong scent of hydrocarbon and marks of a fire at the garage, that the burnt plastic container and the residue collected from below the left and right of the back passenger seat of the said car, the garage structure, and the ground of the garage, all had the remnants of petrol and or commercial petrol, that the fire was ignited with petrol and started at the left side of the back seat of the said car, that the fire could not have started from the outside of the car – "Jikalau kebakaran bermula dari luar tayar-tayar akan mencair. Keempat-empat tayar tidak mencair". Under cross-examination, SP9 maintained that the fire could not have started from outside the car. Under re-examination, S9 said that his conclusion was definitive.

(v) from the investigation officer (SP10 – Chief Inspector Hasri bin Alias), that he found, in the garage area, a plastic container in a semi melted condition, that near the garage area

he found a lighter in a burnt condition, that at 10.30pm on the day in question he arrested the accused who was then seated in the hall, that the accused was normal, was not aggressive, did not smell of alcohol, and was not drunk, that at 2.30am on 24 August 2001 he was informed that the deceased had passed away, and that the said Mahendran passed away in 2003. Under cross-examination, SP10 disagreed that the accused, when arrested, was not aware of what had transpired. SP10 however agreed that the accused, when arrested, was not hiding from arrest.

[11] At the close of the prosecution case, Mr Abraham Matthew for the accused submitted as follows. SP7 gave two versions of the incident. SP7 said that the accused tossed petrol into the car, but reported that the accused OKT burnt ants on the ground near the car. The police report – to burn ants – was the correct version. Intoxication is a defence. The case fell within s. 85(ii) of the Penal Code. The evidence supported that the accused was drunk. Both SP4 and SP6 testified that the accused was drunk. Both SP6 and SP7 testified that the accused was drinking from 18 August 2001. The primary facts showed a case under s. 304. There was petrol on the ground. The accused poured petrol, but was it into the car or onto the ground? Had the accused knowledge that the victim and wife were inside the car? The fact that petrol were thrown into the car was challenged.

[12] The learned DPP, Haslinda binte Abu Bakar, first referred to *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, 467, *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359, 368, and *PP v. Kenneth Fook Mun Lee & Another Appeal* [2006] 1 CLJ 499, 552, 553, and submitted that there was a *prima facie* case, that a court cannot speculate on possible defences, that intoxication must be proved, and that there was no evidence that the accused was temporarily insane. There was only one story from SP7 who clarified that the version in his police report was because his uncle had asked him to so report. The learned DPP contended that s. 300(a), (c) and (d) applied, and that the defence of the accused should be called.

[13] Section 180(1) of the Criminal Procedure Code (Code) provides that "when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused". Given that the alleged offence was

committed in 2003, the definition of a *prima facie* case in s. 180(4) of the Code which came into effect on 7 September 2007 "cannot apply retrospectively" (*PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1 per Zaki Azmi PCA, as he then was) in the instant case. Rather, the definition to apply was that judicially pronounced in *Balachandran v. PP* [2005] 1 CLJ 85, where it was held by the Federal Court per Augustine Paul JCA, as he then was, that a *prima facie* case is one that it is sufficient for the accused to be called upon to answer where the evidence adduced is such that if unrebutted is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen, that a *prima facie* case has not been made out where there is no material evidence which can be believed in the latter sense, that the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established, that the test at the close of the prosecution case is whether the evidence is sufficient to convict the accused if he elects to remain silent, and that an accused who elects to remain silent must be convicted.

[14] The charge was murder. But under the Penal Code, it is not entirely apposite to say that murder has the meaning commonly attached to it throughout the ages, namely, an unlawful killing with malice aforethought. For the word murder in the Code has that meaning ascribed in ss. 299 and 300 of the Code. And that meaning of murder must be gathered first from the definition of culpable homicide, which is committed by "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death" (s. 299 of the Penal Code). But not every case of culpable homicide is murder, for "under the category of culpable homicides fall both cases of culpable homicide amounting to murder and those not amounting to murder" (*Ratanlal & Dhirajlal's Law of Crimes* 25th edn, p 1296). "Culpable homicide is murder (a) if the act by which the death is caused is done with the intention of causing death; (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (c) if it is done with

the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid" (s. 300 of the Penal Code). "Where there is an intention to kill, the offence is always murder ... The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of construction or immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death ... The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder if the injury is sufficient in the ordinary course of nature to cause death ... it is culpable homicide if the act by which death is caused is done with the knowledge is that the act is likely to cause death but murder if it done with the knowledge that death is the probable result" (paraphrased from *Ratanlal & Dhirajlal ibid* pp 1292-1294). "Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder" (per Straight J, in *Idu Beg* [1881] 3 All 776, 778, and quoted in *Ratanlal & Dhirajlal ibid,* p. 1296). "A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention or knowledge as required by that section set out in that definition ..." (*Hashim bin Mat Isa v. PP* [1950] MLJ 94 at 95 per Willan CJ). "The prosecution must ... bring the case under any of the four clauses of s. 300, to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any of the four clauses of s. 300 ... the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under s. 299" (*Kishore Singh* AIR [1977] SC 2267, and quoted in *Ratanlal & Dhirajlal, ibid* p. 1296). Yet culpable homicide, even if within cls. (a) to (d), is not murder, when it is brought within one of the 5 exceptions to s. 300. "The correct approach to the application of (ss. 299 and 300) is this. Section 299 clearly defines

A the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in s. 299 is present, but not the special degrees of *mens*
B *rea* referred to in s. 300 Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s. 300, Penal Code must necessarily fall within s. 299, but all cases within s. 299 do not necessarily fall within s. 300" (*Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 per Raja
C Azlan Shah FJ, as HRH then was).

[15] It has often been observed, that it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v. PP* [1967] 1 LNS 80; *Lim Heng Soon*
D *& Anor v. PP* [1969] 1 LNS 93; *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197; *Dato Mokhtar bin Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151). Hence "intention is a matter of inference" (*Tham Kai Yau & Ors v. PP (supra)*, per Raja Azlan
E Shah FJ, as HRH then was). "A man's intention is a question of fact and it can be gathered from his acts" (*Ratanlal & Dhirajlal ibid* p. 1296). Intention can be inferred from the actor conduct or other relevant circumstances of the case (*Juraimi Husin v. PP* [1998] 2 CLJ 383). Intention to kill can be inferred from the
F nature of the injuries sustained by the deceased (*Sainal Abidin Mading v. PP* [1999] 4 CLJ 215). "Intention must be inferred not merely from the natural consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death" (*Ratanlal & Dhirajlal ibid* p. 1304). "If
G there is no intention to kill, then it can be murder only if (i) the accused knew that the injury inflicted would be likely to cause death, or (ii) that it would be sufficient in the ordinary course of nature to cause death, or (iii) that the accused knew that the act must in all probability cause death. If the case cannot be placed
H as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under s. 304 (Part II) of the Indian Penal Code" (*Ratanlal & Dhirajlal ibid,* p. 1302).

[16] In *Rajwant Singh* AIR [1966] SC 148, the Indian Supreme
I Court stated:

> The 3rd clause (of section 300) discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.

[17] Vivian Bose J, in the leading case of *Virsa Singh* AIR [1958] SC 465, further explained cl. 3 of s. 300 as follows:

> To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 'thirdly'.
>
> First, it must establish, quite objectively that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended;
>
> Once these three elements are proved to be present, the enquiry proceeds further and
>
> Fourthly, it must be proved that the injury of the type just described (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 'thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of the kind will be likely to cause death. Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

[18] *Ratanlal & Dhirajlal ibid* pp 1310-1313 further stated as follows:

A This clause (3) states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this clause (3) and clause (2) of section 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of murder; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be culpable homicide not amounting to murder. It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability is very great, the requirements of this clause are satisfied, and the fact that the particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution has survived an injury which could prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient in the ordinary course of nature to cause death. If a person knowingly causes injuries which are more likely to cause death that not in the ordinary way, his offence falls under either the second or third clause ...

When there are several injuries, and even if none of the injuries is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they are sufficient to cause death, the offence will be murder and not culpable homicide not amounting to murder. In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life ... A Judge must always find whether the bodily injury inflicted was that which was intended by the accused. The nature of the offence does not depend merely on the location of the injury caused by the accused. The intention of the person causing the injury must be gathered from a careful examination of all the facts and circumstances of each given case ...

The emphasis in the clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of

> the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant ... The nature of the material object used and the force used as useful guides in arriving at a decision as to whether the intention and knowledge required by the section can be attributed to the accused ...
>
> ... Each case would depend on its own facts and circumstances ...
>
> ... Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

[19] As said, the existence of circumstances described in any of the five exceptions excuses an act which would otherwise be murder, to the extent that the act constitutes only culpable homicide not amounting to murder and murder. But in view of s. 105 of the Evidence Act 1950 (see *Mohamed Kunjo v. PP* [1977] 1 LNS 74 where it was held by the Privy Council that the burden of proving exception four rests upon the accused), "the prosecution is not obliged to prove the absence of facts which might bring the case within a special exception of s. 300 of the Code, which the accused might set up in his defence. The accused is not also compelled to lead evidence to satisfy the court that the case was brought within (the exceptions). All that may be necessary for the accused is to offer some explanation of the prosecution evidence, and if this appears to be reasonable, even though not beyond doubt, and to be consistent with the innocence of the accused, he should be given the benefit of it" (*Ratanlal & Dhirajlal ibid,* p. 1326).

[20] The alleged act was that the accused tossed petrol into the car where deceased and SP6 were seated, struck a lighter, and then set the deceased on fire. That incident was witnessed by SP7 who testified that the accused had asked him to fill a container with petrol and that the accused tossed that petrol into the car and set deceased and car on fire. That was the basic story of SP7 who said that he was just about 15 feet behind the accused when it all unfolded before him. It was put to SP7, to which he denied, that he had not witnessed the incident. He was challenged, but SP7 must have witnessed the incident, or else SP7 would not have been supported by independent evidence.

A SP7 testified that petrol was tossed into the car, not onto the ground. And it was the testimony of SP9 that the fire started from the interior of the car. SP9 explained that the tyres of the car would have melted, which was not the case, had the fire started from the exterior of the car. And it was the unchallenged
B testimony of SP6 that the car only caught fire after she started to drag the deceased, who was already on fire, out of the car – "Semasa saya tarik Malini ke tempat saya, api dari Malini jatuh ke belakang tempat yang Malini duduk, selepas itu api merebak keseluruh kereta, garaj pun bakar, sikit-sikit" (see p. 28 of the
C NP). Indeed, if petrol had been tossed onto the ground, then it could not at all be likely that the deceased could be on fire before the car was engulfed by fire. It was so clear that the deceased was on fire because of the ignition of a highly combustible material on her body. Otherwise, it could not have been possible for flames
D to shoot out from the body of the deceased. It was so abundantly clear that petrol was tossed into the car, to where the deceased would have been seated.

[21] There was also no reason to doubt the other half of the
E essential story of SP7, that it was the accused who tossed the petrol. Granted, SP7 had lodged two conflicting police reports. In his first report lodged before the death of the deceased, SP7 reported "ayah membakar semut dibawah kereta". And in his second report lodged after the death of the deceased, SP7
F reported "ayah saya membakar kakak di dalam kereta." Learned counsel contended that the 1st report carried the correct story. But with respect, it was not appreciated that in relation to the identity of the person who tossed the petrol and ignited the resultant fire, there was no difference in both reports. In both
G reports, SP7 named the accused as the perpetrator. Therefore, it was the consistent story of SP7 that the accused was the perpetrator. Indeed, there was no reason to doubt the identification by SP7. In point of fact, that the accused was the person who tossed the petrol and that the accused was the only
H person near the car at the material time was also not challenged. Whatever challenge was only in relation to the intention of the accused. It was put by learned defence counsel that the accused intended to burn the ants on the ground beneath the car. But that was not any challenge to the alleged fact that the accused
I tossed the petrol and ignited the resultant fire. Suffice it to say that in relation to the act and perpetrator, it was all so clearly

made out. It was also clearly made out that the deceased had succumbed to the injuries and resultant complications, all caused by the act of the accused. Given that the natural consequences of the act of the accused could be death, it could be inferred that the intention was to kill. It could also be inferred from the act itself that the accused must know that the injury inflicted would be likely to cause death, or that it would be sufficient in the ordinary course of nature to cause death, or that the act must in all probability cause death. It all added up that the ingredients of the alleged offence had been established. The evidence was sufficient to convict should the accused elect to remain silent. That was the undoubted case notwithstanding the evidence that the accused was drinking from 18 August 2001 to about the time of the incident, as intoxication, which is undoubtedly a defence in law (see *Lee Wong Tiang v. PP* [1970] 1 LNS 58 per Azmi LP), could not be considered at the close of the prosecution case (*PP v. Kenneth Fook Mun Lee & Another Appeal* [2006] 1 CLJ 499). Evidence of intoxication would not affect the prosecution case at that stage (see *PP v. Kenneth Fook Mun Lee & Another Appeal* [2006] 1 CLJ 499 per Mohd Ghazali Yusoff JCA quoting *Juma'at bin Samad v. PP* [1993] 3 SLR 338). The accused was ordered to enter upon his defence.

[22] The accused who had elected to give his evidence on oath applied to testify after his witnesses. But that application was refused, as the evidence of an accused, as was correctly pointed out by the learned DPP who cited s. 181 of the CPC and the case of *Saad Abas & Anor v. PP* [1998] 4 CLJ 575, must be taken before that of his witnesses. When he took to the stand, the accused gave the basic story that he was drunk and that he intended to burn red ants that infested the garage. The full testimony of the accused was as follows. On 19 August 2001, he was in his house. That morning, after he got up, he began to drink. At 9am, he woke up SP6, SP7, deceased, and Kishen. He asked the deceased to help SP7 who would be in Form 3 in 2002, with his studies and not to do any housework. The deceased ignored him and proceeded to help SP6 with the laundry. At 9.45am, he asked the deceased why she was doing other work. The deceased did not answer. He said to the deceased, "kalau saya bangun (from his seat), saya datang ke sana baru awak tahu". He wanted to scold the deceased. He frequently quarrelled with SP6, but his relationship with his children was

A good. He had never struck his children. At 10am, the deceased walk out of the house and slammed the door after her. He followed the deceased. He scolded the deceased. He asked the deceased why she would not do his bidding, to help her brother with his studies. "Saya angkat batu dan kata saya baling dan baru
B awak tahu." He wanted only to frighten the deceased. He had no intention to throw that stone. The deceased picked up a coconut on the ground and said "kalau ayah baling batu dia akan baling kelapa muda". Neighbours were watching the proceedings. Feeling ashamed, he tossed the stone onto the ground and entered the
C house. "Saya masuk rumah, dan minum samsu, sambil merokok dan tengok tv." He enquired from SP7 as to what the deceased was then doing. SP7 informed him that the deceased had moved to the front of the house. He was sad that the deceased had disobeyed him. He went back to bed. He woke up at 12pm. He
D started to drink again. It was usual for him to drink on Saturdays and Sundays. At about 12.30pm, he asked SP7 to inform the estate clerk that the following day he would take leave, as he had drank too much. He had drunk the content of a whole big bottle. He was drunk. He fell asleep. He woke up at about 2.45pm. SP7
E told him that he (SP7) had informed the estate clerk. He asked SP7 to fill a small container with petrol stored in the prayer room. SP7 did so but said that he was afraid to fill the motorcycle with petrol from the container. He took that container of petrol and filled his motorcycle with petrol. In the process, he smeared his
F hands with petrol. He asked SP7 to wipe the remnants of petrol on the petrol tank. But before he did that, SP7 informed him that there were many red ants in the area of the garage. "Shatesh kata tuang sedikit petrol di kawasan semua, dan kasi bakar. Selepas Shatesh masuk ke dalam rumah, saya pergi ke garaj lalu tuang
G petrol, tuang banyak petrol, tinggal sedikit sahaja petrol dalam tong. Lepas tuang saya pergi duduk di tempat longkang rumah saya, dan terus bakar dengan lighter. Tangan kiri saya pegang tong kecil dengan petrol. Semasa saya petik lighter ada letupan, saya terus campak tong kecil ke tempat garaj. Saya fikir tong kecil boleh
H lepas bawah kereta, sebab tong itu kecil dan saya fikir boleh lepas. Dua tangan saya, sebelah kanan badan saya dan muka saya sebelah kanan terbakar. Saya terus pergi ke bilik air, untuk sejukkan badan. Pada masa itu saya melihat isteri sedang makan nasi didapur, Bilik air dengan dapur ada dekat-dekat. Lepas saya
I mandi saya dengar jeritan isteri, saya terus lap badan dengan tuala. Masa itu saya ingat kereta yang terbakar. Lepas itu saya bawa

dua baldi dengan air. Pada masa itu pintu tertutup, kedua-kedua motor ada di dalam rumah. Saya tidak tahu siapa yang masukkan kedua-dua motor ke dalam rumah. Saya buka pintu dan melihat kereta saya sedang bakar. Banyak kuat api. Sebelah rumah ada jiran menjerit: sapa pasal kasi bakar anak. Jiran juga kata, lagi minumlah, lagi kasi bakar anaklah. Saya jawab kereta yang terbakar, mengapa kata anak yang terbakar. Pada masa itu beberapa orang cuba padam api. Pada masa itu saya melihat Malini dan isteri sedang menangis ditepi jalan. Semasa saya tuang petrol saya tidak tahu Malini berada dimana." He had not tossed petrol into the car. When he tossed the petrol, "saya tidak tahu samada ada orang dalam kereta". On his drinking habit, the accused said that he had drinks that previous Friday after work, on that previous Saturday after 8pm, when he consumed a half bottle of alcohol, that he would have drinks every Saturday and Sunday and on every payday, and that he would drink slowly, but he would become quickly intoxicated. On 19 August 2001, he was very drunk. The accused added that he knew little of the incident and that most of what he knew had been told to him, whilst he was under remand, by SP6 and SP7. He could only recollect the events in the morning. Saya ada memberi ID13 kepada polis. His testimony on the events in the morning was also based on what he heard, whilst he was under remand at the Layang-Layang Police Station, from SP7, and from what he heard when he visited the deceased in hospital on 21 August 2001. "Saya hanya ingat saya menyuruh Malini mengajar adik, itu sahaja saya boleh ingat. Minum arak, saya ingat. Saya ingat saya minum sampai pada 10 pagi. Saya ingat semua kejadian pada pagi. Selepas minum saya tidak boleh ingat kelakuan saya. Semasa itu saya tidak tahu apa yang saya lakukan. Semasa itu saya tidak tahu perbuatan saya samada salah. Saya juga tidak tahu akibat perbuatan. Saya hanya fikir bakar semut sahaja. Saya tidak tahu sifat perbuatan saya.

[23] Under cross-examination, the accused said he could remember that he quarrelled with the deceased, that he picked up a stone, that the deceased picked up a coconut and said "jika ayah baling, Malini akan baling kelapa muda", and that neighbours were looking on as he and deceased quarrelled. He said he was arrested at 9pm. However, the accused said that he remembered very little of the car on fire. The accused said that he could not remember the following events: that he was in the hall where SP6, SP7, Kishen, and deceased were then watching TV at 1pm, that

he scolded SP6 for watching TV, that SP6 walked out of the house, that he followed SP6, that he and SP6 quarrelled outside the house, that he re-entered the house and sat in the hall, that there he scolded the deceased for watching TV, that he asked SP7 to inform the estate clerk that he would be taking leave on 20 August 2001, that SP7 filled a small container with petrol from a large container, that SP7 placed that small container of petrol in the hall, that he took the container of petrol and then headed to the garage, that he doused the flames on his body with his hands, that the deceased and SP6 were crying whilst lying on the road, that he just stood by and watched from inside the house as events outside unfolded.

[24] The accused disagreed with the learned DPP who proposed that SP7 had not seen him after his arrest, that SP6 and or SP7 had not related the events to him, that all events began at 12.30pm and not at 9am, that there was only a small bottle of alcohol in the house on 19 August 2001, and or that he was not drunk on 19 August 2001. The accused said that he did not know that the deceased and SP6 were inside the car. To the following question, "Kamu masih marah Malini atas cara Malini menjawab, kamu terus buka pintu ditempat Malini duduk, disebelah kiri kereta, kamu telah tuang petrol pada Malini, dan petik lighter dan nyalakan api pada Malini" the accused answered, rather cryptically, "Tidak tahu".

[25] The accused agreed that the deceased said "mengapa marah, Malini tidak ganggu kamu". The accused added that that was said by the deceased from outside the house in the morning, that the "stone and coconut" incident took place in the morning, and that he quarrelled in Tamil. To the suggestion of the learned DPP that he would not render assistance as it was his intention to burn the deceased, the accused replied that he was not aware of what had happened. The accused disagreed that he was in control and was aware of his act on the day in question. The accused said that he was only sober at night. The accused also disagreed with the learned DPP who proposed that SP7 had no reason to frame him. The accused said that he had been drinking for seven to eight years. He would normally drink a small bottle. But on the day in question, he had consumed a large bottle. The accused disagreed with the learned DPP who proposed that he was not drunk on that fateful day and that he knew the consequences of his act.

[26] Under re-examination, the accused said that if he knew that the deceased was inside the car he would have rendered his assistance, that on that day he was angry but had no intention to kill his daughter over a small matter which was not any reason to kill, that it was because it was a small matter that he threw the stone onto the ground, that it was not possible for him to kill his own child, and that he loved his three children.

[27] DW2 (Rajendran a/l Kunci Raman – a younger brother of the accused) testified as follows. He lived at the Ulu Remis Estate. At 1.55pm, on 19 August 2001, he was informed that a car was on fire at the house of the accused. Once there, he found that the roof the garage had collapsed, and that the said car was standing about 100 metres away from the garage. The accused was lying on the floor in the hall. He, SP7 and Kishen tried to wake up the accused. The accused was "tidak sedar". SP7 and Kishen were crying. He asked SP7 as to what had happened. SP7 replied "kereta terbakar. Dalam kereta ada Malini". He asked how it could be that the deceased could not get out from the car. SP7 did not reply. SP7 just cried. He asked for the whereabouts of the deceased. SP7 replied that the deceased had been taken to the hospital. He took SP7 and Kishen to the house of his brother, Mahendran. Mahendran died in 2003. At that time, the accused was still "tak sedar". He left the accused inside the house with the door opened. He returned about 10-15 minutes later. "Saya kejutkan OKT, OKT tak sedar macam mabuk-mabuk. Lepas itu saya marah OKT, tanya apa sudah berlaku pada kereta dan anak. Saya tanya mana anak, OKT tak jawab. OKT buka mata dengan separuh-separuh." He proceeded to the Kluang Hospital. There, he asked SP6 as to what had happened. SP6 said it was not the accused who set the car on fire. "Semasa minum, OKT suka membebel, akan ulang-ulang kata dia." SP6 had not complained to him about the drinking habits of the accused, but neighbours had informed him that the accused "selalu minum dan selalu guna bahasa kasar". The accused was a fast drinker, but was fast intoxicated. "OKT tak suka minum slow, laju minum dan tak suka duduk lama. Pada hari perayaan, ahli keluarga berjumpa dan minum bersama, tetapi OKT tidak duduk lama, OKT minum cepat dan balik. OKT suka lawan cakap, tetapi tidak cari gaduh, saya pernah melihat OKT mabuk. Semasa mabuk bercakap macam-macam. OKT tak suka minum diluar, OKT suka minum di dalam rumah." The accused loved the deceased.

[28] Under cross-examination, DW2 agreed that he was not present before and during the incident, and that he knew not the condition of the accused before and during the incident. DW2 however disagreed that his story was not true, that he knew that the accused would always scold the deceased, that he was not at the said house on 19 August 2001, that he did not see SP7 and or Kishen on 19 August 2001, and or that it was Mahendran who took SP7 and Kishen from the house of a neighbour. DW2 however agreed that Mahendran was in the house at 4pm, and that SP7 did not return to the house after the deceased had been taken to the hospital. DW2 disagreed that Kishen was not inside the house after the incident, that his story about the three of them trying to wake the accused, then drunk, was a lie, that his meeting with SP6 at the hospital was a lie, that his story arose only during the trial, and or that he had come to court with a contrived story to help the accused. DW2 maintained that his story was true. DW2 was not re-examined.

[29] The last witness for the defence was another younger brother (Krishnan a/l Kunchi Raman – DW3) of the accused, who testified as follows. At 9pm on 19 August 2001, Mahendran telephoned and informed him that the police was in the house of the accused. He proceeded to the accused's house. There, he found the accused sleeping in his bedroom. After several attempts, he managed to wake the accused. The accused could not enlighten him as to the whereabouts of the deceased. He asked the accused why he was not at the hospital. The accused said that he had no transport. Thereafter, the police entered the house, arrested the accused, and searched for alcohol bottles and petrol containers. The accused cried after he was handcuffed. The accused asked him for the reason for his arrest. He advised the accused to follow the police. He said to the accused that he would "akan datang tengok". He shut the windows and closed the door of the house. He asked neighbours to watch over the house. He had no personal knowledge of the family problems of the accused. But from neighbours of the accused, he had heard that the accused had a drinking problem. When sober, the accused was accomplished in all manner of work. The accused was a good cook. The accused loved the deceased. The accused would give whatever she asked. There were no problems between the accused and the deceased. "Saya pernah melihat OKT semasa

mabuk. Bila mabuk, OKT minum cepat. Kalau minum banyak, OKT terus tidur. Semasa mabuk OKT boleh kawal diri sekejap sahaja. Lepas mabuk, OKT tak ingat apa yang telah berlaku.

[30] Under cross-examination, DW3 said that he was not aware of the condition of the accused before and after the incident. He added that Mahendran was not present when the police arrived at the house. He however disagreed that he was also not present and or that the accused was sober, was not reeking of alcohol but was seating in the hall, when the police arrived. DW3 maintained that he was in the house of the accused when the police arrived, and that his story was not an invention. DW3 also maintained that he had no knowledge that the accused had constantly scolded the deceased. Finally, DW3 disagreed that the accused could not be drunk that easily. DW3 was not re-examined.

[31] Mr Abraham Matthew submitted that even prosecution witnesses testified that the accused consumed alcohol on the day in question and the day before. There was evidence that accused was drunk. The difference in character, when sober and when drunk, was stated by SP6 and DW2. There could not have been a specific intention to kill. In *Lee Wong Tiang v. PP* [1970] 1 LNS 58, there was an act by the accused that showed the intention. In *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359, 392, the court found that the accused was not intoxicated, as the accused could negotiate and was in control of his car. There should be some evidence of an act that came within s. 300(d). Motive shows intention, and the absence of motive showed an absence of intention (counsel cited *Yeo Ah Seng v. PP* [1967] 1 LNS 216). Evidence was admitted in *Chia Chan Bah Alias Chiah Ah San v. Rex* [1938] 1 LNS 12 to show motive. In present case, there was no evidence of any reason to kill, or intention to kill. In his state of mind, the accused would not have had the knowledge under s. 300(d). The defence of intoxication had been made out. In *PP v. Muhamad Suhaimi Abdul Aziz* [2005] 2 CLJ 826, 833 it was held that the lack of motive was an important indication of insanity. Given the testimony of the accused, the alleged act was not challenged. But through PW6, PW7, and accused himself, it was proved that the accused was intoxicated to a degree of temporary insanity. In *PP v. Teo Heng Chye* [1990] 1 CLJ 194; [1990] 3 CLJ (Rep) 904, the charge was reduced to 304(b).

A Intoxication was taken as a mitigating factor for a lesser offence in *Juma'at Samad v. PP* [1993] 3 SLR 338. Had the accused not been intoxicated, the offence could not have occurred. *PP v. Teo Heng Thye* [1990] 1 CLJ 194; [1990] 3 CLJ (Rep) 904 is most relevant, as the offence of murder was reduced to one under
B s. 304 by reason of intoxication.

[32] The learned DPP submitted that to be a defence intoxication must meet s. 85(ii)(b). The accused said that the accused could not remember events in the afternoon. Scientific evidence would
C be reliable. But there was none. The only evidence was the account related in court. The law on intoxication was stated in *Francis Antonysamy v. PP* [2005] 2 CLJ 481. The best evidence to establish the state of mind was the conduct prior to, at the time of, and after the offence. The accused was a seasoned
D drinker. To ask why the accused did it would be to search for motive which is not an ingredient under s. 300. Only knowledge or intention was relevant. It could not be denied that that the accused had drinks. But what had he drunk. The accused was aware of events in the morning. That he admitted. So, he could
E not have been that drunk. The accused never said he was drunk. If he were really drunk, then how could he have remembered the events in the morning? Irrationality is not insanity. In *Aladin v. PP* [1964] 1 LNS 4, the court rejected the evidence of drunkenness. In *Ismail bin U.K. Abdul Rahman v. PP* [1974] 1 LNS 53, it was
F held that intoxication on the bare statement of accused was inadequate to negative intention. There was a stronger case of intoxication in *Kenneth Lee* than the instant case. The accused said he could only remember events before 10am. The accused could remember the store and coconut incident between him and
G deceased, that neighbours were witnessing the quarrel, that he felt ashamed, that he retreated back to his house, and that he spoke to the deceased and PW7, that he asked DW7 to take petrol. The accused could remember all other facts presented by the prosecution. DW2 said that he came to the house at 1.55, that
H PW7 said that the car "terbakar" and that he took the children to another house (Mahendran's house). But there was no notice of DW2's story. The incident took place at 3-4pm. Therefore, DW2 could not be at the house at 1.55pm. Moreover, it was the testimony of PW7 that after the incident he was at the
I neighbour's house and that it was Mahendran who took him to Mahendran's house. It was unchallenged that it was Mahendran

who took PW7 away. DW3's story was also raised for the first time during defence. Motive must be distinguished from intention. Both PW6 and PW7 said that the accused had been drinking. But what was drunk had to be proved. It was voluntary intoxication. Insanity must fulfil s. 85(ii). There was no evidence to support insanity. Section 86 provided that intoxication could be taken into account to consider whether there was the specific intention or otherwise. The burden lies with an accused to show that there was no specific intention within the meaning of s. 86 of the Penal Code. Section 86 only applies to cases where the *mens rea* is intention, not knowledge. The learned DPP cited *Juma'at bin Samad v. PP* [1993] 3 SLR 338. Where there is a case under 300(d), s. 86(2) is irrelevant and cannot be applied. When s. 300(d) applies, it can also fall under 300(a), (b) and (c). But under 300(d), it must be an act eminently dangerous and wholly inexcusable. As for s. 86(2), in *Kenneth Lee*, the Federal Court held that the accused must show it on a balance of probabilities. In *Francis Anthonysamy v. PP* [2003] 1 CLJ 831, the Court of Appeal expended on intoxication and the standard of proof. The accused was not drunk. He committed the act, as he was very angry with the deceased who shamed him in the presence of his neighbours. There was no defence. The *prima facie* case was intact. The intention was under (a) and or (c), and the knowledge was under (d).

[33] At the close of the prosecution case, it was held that intoxication could not be considered at the stage of the prosecution case for it could be only considered at the close of the entire case, when it would be "a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission" (see s. 85(ii) of the Penal Code). There was no evidence that the alleged state of intoxication of the accused was caused without his consent by the malicious or negligent act of another person. If at all, the alleged state of intoxication of the accused was self-induced. It was the testimony of SP6 that the accused "datang bising-bising" whilst she and her children were watching a Tamil movie being televised,

A that the accused "marah tanpa sebab, sebab dia mabuk" (see p. 25 of the NP), and that the accused consumed the content of bottle P4C between 11am and 12.30pm on 19 August 2001. In truth, it was the consistent story of SP6 that the accused was drunk, for it was the testimony of SP4 that SP6 reported to the B police on 19 February 2001 that "suami telah bakar anak" and that the accused was drunk. It was the testimony of SP7 that P4C was indeed in the house on 19 August 2001, that the accused had consumed the content of a bigger bottle at 7.30pm on 18 August 2001, that he was used to seeing the accused C "minum dari botol besar", that he had occasion to witness the accused drinking for 3 continuous days, and that in a month the accused would consume the content of 10 to 15 similar bottles. The conduct of the accused was also testified to by SP6 and SP7, who generally agreed that the accused was aggressive in D manner whilst under the influence of alcohol but was otherwise nice in disposition when sober. In so far as the bottles produced by the prosecution were concerned, the court detected that the content therein, the residue that remained, smelt distinctly of alcohol. There could be no mistake about it. Even at the stage of E the prosecution case, it was in evidence that the accused was under the influence of alcohol at about the material time of the offence.

[34] But what was the state of intoxication of the accused? It F was the testimony of SP6 that the accused was drunk. It was the testimony of the accused that he was drunk on 19 February 2001. On the alleged state of intoxication of the accused, the learned DPP contended that only scientific evidence would be reliable evidence. In effect, in the absence of scientific evidence, it was G urged upon the court to reject the oral account of the alleged state of intoxication of the accused. But that oral account could not be rejected just like that because of the absence of scientific evidence. Other factors would not accept that. In the first place, it was part and parcel of the prosecution story itself, which set H the instant case apart from the cases cited *(Lee Wong Tiang v. PP; PP v. Kenneth Lee; Juma'at bin Samad)* that the accused was under the influence of alcohol. Next, it was the effect of the evidence, pertinently from the prosecution itself, that the behaviour of the accused was not only odd but strange. It was the testimony of I SP5 that the accused was standing in front of his house and

watching the proceedings while he (SP5) was helping SP6 to drag the deceased out of the car – "OKT berdiri, tengok sahaja". If that were so, then that behaviour of the accused, just standing in front of his house and watching the proceedings while SP5 was helping SP6 to drag the deceased out of the car was most abnormal, that is if the accused were still clear headed enough, as was contended by the prosecution, at the material time. If it were true that the accused were still not that inebriated and still able to appreciate his act and the consequences thereof, then it could not be rationalised just how it would be that the accused could be standing by while SP5 and SP6 were dragging the deceased who was on fire out of the car, as if it did not concern him. It would seem more logical that the accused would not be standing by at the scene of his crime, would not be watching the proceedings whilst his victim was being rescued, that is, if the accused were not drunk and or were clear headed enough to have appreciated his erstwhile act and the consequences thereof. If the accused were sober, then his behaviour could not be rationalised.

[35] Indeed, the total conduct of the accused, as related by the prosecution, was not consistent with guilt and or with an appreciation or sufficient appreciation of his erstwhile act on the part of the accused. The testimony of the investigation officer (SP10 – Chief Inspector Hasri bin Alias) was that at 10.30pm on 19 February 2001 he arrested the accused who was then seated in the hall, that the accused was normal, was not aggressive, did not smell of alcohol, and was not drunk. That was evidence that the accused was not drunk at 10.30pm, that is, some seven hours after the event. But paradoxically, that was also evidence that the accused was most abnormal in his manner, for if the accused had any realisation of his erstwhile act and the consequences thereof, then his manner could not be anything close to normal, could be seated in the hall, as if nothing had happened.

[36] There was no scientific evidence that the accused was drunk. But it "must be observed that such (scientific) results are not conclusive to determine the degree of intoxication of a person" (*Francis Antonysamy v. PP* [2005] 2 CLJ 481 per Augustine Paul JCA, as he then was, delivering the judgment of the Federal Court). At any rate, it could not tie up, as could be seen from the above, that the accused was not drunk. Actually, there was one further fact that put the very sanity of the accused

into further question. The evidence was that the accused tossed petrol into the car, to where the deceased and SP6 were seated, then struck a lighter, and set alight the fire that engulfed the deceased. It was contended by the prosecution that the accused did so as he was angry with the deceased who shamed him in front of his neighbours. If that were so, then the accused had only what perverse reason to harm the deceased. But seated inside the car was also SP6. And there was no plausible cause or reason for the accused to harm SP6. If the accused were sane, or knew what he was doing, then it would not add up that the accused would have done what he did, tossing petrol to where the deceased and SP6 were seated and then setting the petrol alight, for that would also surely put SP6, who was not the butt of his fury and who was his wife, into certain danger. As it turned out, SP6 also suffered some burns, *albeit* minor. If the accused knew what he was doing, then it would seem more implausible than not that the accused would have desisted, what with both deceased and P6 seated inside the car.

[37] All said, it would seem not unreasonable to accept that the accused would have been drunk. It would also seem not unreasonable to accept that the accused would not have known what he was doing by reason that he, in his intoxicated state, would have been temporarily insane. Yes, there was no definitive proof (see *Chia Chan Bah Alias Chia Ah San v. Rex* [1938] 1 LNS 12, where it was held by the Court of Criminal Appeal per Mcelwaine CJ, Terrell & Home JJ that the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt) that the accused was temporarily insane. But neither could it be said that the alleged state of intoxication was all down to the bare statement of the accused. The fact of the matter was that if the accused were not temporarily insane, then it could not be explained how the accused could kill his daughter, all because of a minor domestic row. The act of the accused was mindless and insane. Surely that could say that the accused could well have been pathologically drunk. In his deluded mind, the intention of the accused could well have been to burn ants that infested the said garage.

[38] Section 86(2) of the Penal Code provided that: "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence". Given the evidence, there was a doubt as to whether the accused in his intoxicated state could have formed the necessary intention or knowledge to constitute the offence of murder.

[39] For those reasons, the accused was acquitted and discharged on account of s. 85(ii) of the Penal Code, but with the finding that the accused committed the act and the further direction that the accused be held in safe custody in a suitable place of detention, during the pleasure of His Royal Highness, the Sultan of Johor.